inconceivable that more harm would result in this case by allowing the legal and disallowing the illegal than resulted in the *Pullman* case. The difference between the acts of the two companies being merely one of degree, the courts, in order to be consistent, ought to apply the same principles to both cases. There was a time when the B company would have been ousted without any hesitation or procrastination, but, under the new order of things, it is hardly possible that the court would order anything more drastic than that the B company dispose of the property which it is illegally holding and using. *Com.* v. *Newport, L. & A. Turnpike Co.*, 97 S. W. 375, 29 Ky. Law Rep. 1285, 100 S. W. 871, 30 Ky. Law Rep. 1235; *Att'y Gen.* v. *Consolidated Gas Co. of N. Y.*, 108 N. Y. Supp. 823, 124 App. Div. 401; *State* v. *Nashville Baseball Club*, 127 Tenn. 292, 154 S. W. 1151; *Louisville School Board* v. *King*, 127 Ky. 824, 107 S. W. 247, 32 Ky. Law Rep. 687. M. McL.

THE INTERPRETATION OF "DEATH" AND "SURVIVAL" ACTS.—The recent case of *Klann* v. *Minn.*, 154 N. W. 996, decided by the Supreme Court of Wisconsin, calls attention to the interpretation in the various states of the two statutes affecting the civil liability of one who through his wrongful acts causes the death of another, which has resulted in a decided conflict of authority. One statute, known generally as the "DEATH ACT" (modelled after LORD CAMPBELL'S ACT) gives a right of action for the pecuniary loss suffered by surviving relatives by reason of the death; the other statute, known as the "SURVIVAL ACT," gives a right of action to the personal representative of the deceased, for the loss which accrues to the injured person before death. *Brown* v. *C. & N. W. Ry.* 102 Wis. 137, 171.

For the measure of damages under the "DEATH ACT" see *Irwin* v. *Pa. R. Co.*, 226 Pa. St. 156, 75 Atl. 19, and cases cited in the note on that case in 8 MICH. L. REV. 501. The measure of damages under the "SURVIVAL ACT" is discussed in *Kyes* v. *Valley Telephone Co.*, 132 Mich. 281, and *Olivier* v. *Houghton County St. Ry. Co.*, 138 Mich. 242. In *Johnson* v. *Eau Claire*, 149 Wis. 194, it is said: "The damages recoverable when death occurs instantly are the pecuniary losses sustained by relatives of the deceased named in the Act, and must be paid over by the administrator to such relatives. The damages recoverable under the new right of action allows the administrator to prosecute, for the benefit of the estate, the claim that the party would have had if he had lived. These damages include: pain and suffering, permanent disability, disfigurement, moneys by him expended for medical attendance and nursing, loss of earning capacity after majority, and, in case of emancipation, loss of earning capacity during minority as well." Since the damages recoverable under the two statutes depend on different circumstances and vary so widely, it is not strange that much litigation has resulted from the endeavor to recover under one or both of these statutes.

The principal point of difference in the different jurisdictions seems to be on the question whether the two statutes give two rights of action for the same death, or whether the rights of action conferred by the two are exclusive one of the other. See 15 HARV. L. REV. 854. Michigan holds that

the remedies are mutually exclusive, and that if the death is instantaneous the action must be brought under the "DEATH ACT"; if the death from the wrongful act is not instantaneous, action can be brought only under the "SURVIVAL ACT." *Dolson* v. *Lake Shore & Michigan So. Ry. Co.*, 128 Mich. 444, 87 N. W. 629; and an article on "CONSTRUCTION OF 'SURVIVAL ACT' AND 'DEATH ACT' IN MICHIGAN" in 9 MICH. L. REV. 205. Other courts restrict the operation of the "SURVIVAL ACT" by allowing it to apply only where death results from some cause other than the cause of the injury. *Holton* v. *Daly*, 106 Ill. 131; *Martin* v. *Railway Co.*, 58 Kan. 475; *Berner* v. *Whittelsey Mercantile Co.*, 93 Kan. 769, 145 Pac. 567. A greater number of courts, however, take the view that if the death is not instantaneous, recovery may be had under both acts, one recovery for the benefit of the deceased's estate and the other for the pecuniary loss sustained by the relatives of the deceased. See *Brown* v. *C. & N. W. Ry.*, 102 Wis. 137. Still another rule is that of Oklahoma, where it is held that recovery can be had under both statutes without regard to the question of instantaneous death. *St. Louis, etc., R. Co.* v. *Goode*, 42 Okla. 784, 142 Pac. 1185. Kentucky varies the Michigan rule to the extent of holding that if death is not instantaneous, recovery can be had under either of the two statutes, but not under both. *Chesapeake R. Co.* v. *Banks*, 142 Ky. 746, 135 S. W. 285.

Under all but the Oklahoma rule it will therefore be seen that the question of whether or not the death was "instantaneous" is a vital one. This gives rise to another conflict upon the question of what constitutes instantaneous death. Michigan lays down this rule: "Where there is a continuing injury, resulting in death in a few moments, it is 'instantaneous.'" *West, Admrx.*, v. *Detroit United Ry.*, 159 Mich. 269; see for criticism of this rule the article in 9 MICH. L. REV. 205, above referred to.

Another view is that any substantial period of suffering, whether there was consciousness or not, is sufficient to enable the cause of action to vest in the deceased, and hence to survive to his personal representative. *Kellow* v. *Railway Co.*, 68 Ia. 470, 23 N. W. 740; *Capital Trust Co.* v. *Great Northern Ry. Co.*, 127 Minn. 144, 149 N. W. 14; *Hollenbeck* v. *Berkshire R. Co.*, 9 Cush. (Mass.) 478. A third rule is that there must be a period of conscious suffering between the injury and the death. *St. Louis, etc., R. Co.* v. *Robertson*, 103 Ark. 361, 146 S. W. 482; *Perkins* v. *Oxford Paper Co.*, 104 Me. 109, 71 Atl. 476; *Moyer* v. *Oshkosh*, 151 Wis. 586, 139 N. W. 378; *Melzner* v. *Northern Pac. R. Co.*, 46 Mont. 162, 127 Pac. 146.

Under the rule last mentioned another question arises, viz., how long must this period of consciousness last? In the principal case above cited (*Klann* v. *Minn.* 154 N. W. 996), action was brought by the administratrix of Arthur Klann, deceased, to recover damages based upon the alleged negligence of the defendant in causing the fire in which deceased was burned to death. The first cause of action stated was for the pain and suffering of the deceased. Defendant demurred to this cause of action, arguing that the following allegation is not sufficient to show a basis for damages for pain and suffering between injury and death: "A few minutes after he was

caught by the said flames and exposed to the said burning, he then and there died from the effect of the flames and the burns he received from them." The Supreme Court overruled the demurrer, holding that the word "few" was a relative term and of great elasticity of meaning, and the allegation therefore sufficiently showed that there was a "substantial period of suffering between injury and death." It is to be noted that the same test is applied to determine whether or not a recovery for pain and suffering will be allowed that is used to determine whether or not the action survives under the "SURVIVAL ACT." This would seem to furnish an explanation for the third rule stated above, which requires a period of conscious suffering. That is, the courts following that rule seem to have confused the survival of the entire action with the survival of the cause of action for the pain and suffering of the deceased. Under the Iowa, Massachusetts, and Minnesota rule, stated supra, even though death did not immediately ensue and the cause of action survived for that reason, recovery for pain and suffering of deceased will not be allowed without the further showing of consciousness. *Tully* v. *Fitchburg R. Co.*, 134 Mass. 499. Under the Wisconsin rule, if the action survives at all the cause of action for pain and suffering must also survive.

The facts given in *Klann* v. *Minn.*, supra, together with the allegation stated, indicate that the deceased was burned to death before being taken from the flames, and therefore the injury which caused the death was a continuing injury, continuing to operate directly until death resulted. Hence the Wisconsin court evidently rejects the Michigan rule stated in the *West* case, supra, which is that a continuing injury resulting in death makes the death instantaneous. The Wisconsin court in this case must have taken judicial notice of the fact that the first flame which reached the deceased would not cause either instant death or unconsciousness, and the time intervening after the time of his first injury from the first flame, and before the total extinction of life, was a sufficient period of conscious suffering to enable the cause of action to survive and to ground the claim for pain and suffering of deceased. Upon this point the Supreme Court of the United States and the lower federal courts have taken a different view. In *Cheatham* v. *Red River Line,* 56 Fed. 248, damages were claimed for suffering while the deceased was struggling in the water and drowning, but recovery was denied. In *The Corsair,* 145 U. S. 335, where a boat struck the bank of a river and sank in about ten minutes, and a passenger was drowned, it was held that there could be no recovery for mental and physical pains before death; that they were substantially contemporaneous with death and inseparable as a matter of law from it. In *St. Louis & Iron Mtn. Ry.* v. *Craft,* 237 U. S. 648, the rule is stated as follows: "such pain and suffering as are substantially contemporaneous with death or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under statutes like that which is controlling here." The line is a hard one to draw between pain and suffering which

may be recovered for and that which may not, but here we seem to have another point upon which conflicts will result in the interpretation of these two statutes. W. C. M.

EVIDENCE OF HABIT OF CARE, CAUTION AND PRUDENCE AS NEGATIVING CONTRIBUTORY NEGLIGENCE.—In an action for death by wrongful act, when there were no eyewitnesses and no facts susceptible of proof to disclose how the fatality occurred, the plaintiff, having the burden of proof with regard to contributory negligence, was allowed to prove the "habits of the deceased as to care, caution, and prudence, as tending to raise the presumption that he was in the exercise of due care and caution for his own safety at the time he was killed." The Supreme Court of Illinois upheld this instruction, saying: "As the proof made relative to the habits of the deceased tended to raise this presumption, it was sufficient to go to the jury." *Casey* v. *Chicago Rys. Co.* (Ill. 1915), 109 N. E. 984.

The rule that, in the absence of eyewitnesses and of proof of the circumstances surrounding the case from which the presence or absence of contributory negligence might be determined, habit of care is admissible as tending to raise a presumption that there was no contributory negligence was laid down by the Illinois court in *Chicago, Rock Island & Pacific Ry. Co.* v. *Clark,* 108 Ill. 113, and has been applied in a long line of Illinois decisions, and more often, probably, than in any other state.

There is, however, a decided conflict in the holdings of the various courts which have been called upon to pass upon the question as to whether or not habit of care and habit of negligence are admissible to prove the absence or existence of contributory negligence. The holding of the Illinois court finds support in California in *Craven* v. *Cent. Pac. R. R. Co.,* 72 Cal. 345 (habit of negligence); in Kansas in *Missouri Pac. Ry. Co.* v. *Moffatt,* 60 Kansas 113 (habit of care); in New Hampshire in *Parkinson* v. *Nashua & Lowell R. R. Co.,* 61 N. H. 416 (habit of negligence); *Evans* v. *Concord R. R. Corp.,* 66 N. H. 194 (habit of care), and *Lyman* v. *B. & M. R. R.,* 66 N. H. 200 (habit of care); and in Rhode Island in *Cassidy* v. *Angell,* 12 R. I. 447 (habit of care). The contrary view seems to be held in Connecticut in *Morris* v. *Town of East Haven,* 41 Conn. 252 (habit of care); in Pennsylvania in *Baker* v. *Irish,* 172 Pa. St. 528 (habit of negligence), and in Wisconsin in *Propsom* v. *Leatham,* 80 Wis. 608 (habit of negligence), though in all of these cases there seem to have been eyewitnesses; under such circumstances, even by the Illinois rule, the evidence would not have been admitted, but these courts do not seem to take this fact into consideration, whereas, in *Dalton* v. *Chicago, Rock Island & Pac. Ry. Co.,* 114 Io. 527, and *Zucker* v. *Whitridge,* 205 N. Y. 50, the court makes this distinction, deciding merely that such evidence is not admissible where there are witnesses. These holdings are not, therefore, contrary to the Illinois cases.

Both habit of care and habit of negligence would seem to fulfill the first requirement of admissibility, *i. e.,* they possess a distinct probative value.